

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 12, 17 & 18 of 1997

with

CRIMINAL REVISION APPLICATION No 85 of 1997

In

SPECIAL CRIMINAL APPLICATION NO. 204 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

LIMBABHAI VAJABHAI KHARADI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 12 of 1997
MR KJ SHETHNA for Petitioner
Mr J M Thakore, Advocate General with Mr P G Desai,
GP for Respondent No. 1
Mr B T Rao, Addl. Central Govt. Standing Counsel
for CBI
2. Criminal Revision Application No 17 of 1997
MR TS NANAVATI for Petitioner
Mr J M Thakore, Advocate General with Mr P G Desai
GP for the State
Mr B T Rao, Addl. Central Govt. Standing Counsel for
CBI

3. Criminal Revision Application No.18/97

Mr P M Thakkar, Sr.Advocate with Mr R J Goswami
for the petitioner

Mr J M Thakore, Advocate General with Mr P G Desai,
GP for the State

Mr B T Rao, Addl.Central Govt.Standing Counsel
for CBI

4. Criminal Revision Application No. 85 of 1997

Mr P G Desai, GP for the State

Mr R C Jani for the respondent

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 20/02/98

COMMON JUDGEMENT

Leave to add CBI as party-respondent in all the
three Criminal Revision Applications. Mr B T Rao,
learned Addl.Central Government Standing Counsel waives
service on behalf of the CBI.

These three Criminal Revision Applications are
disposed of by this common judgment.

Revision Applications being Criminal Revision
Applications No.12, 17 of 1997 arise out of the order of
the Special Judge and Addl. Sessions Judge, Court No.11,
Ahmedabad rejecting application Exh.4 and framing of
charge against the accused persons as per the allegations
made in the police papers. Criminal Revision Application
No.85/97 has been filed by the State Government against
the order passed below Exh.34 whereby the accused Dr K P
Sutaria has been discharged for want of sanction under
section 197 of the Criminal Procedure Code.

2. The necessary facts are that on the basis of a
complaint of one Ms. Bijal Joshi dated 5.8.1995, the
Anti Corruption Bureau of Ahmedabad had registered a case
against Peerzada Saiyed Moiyuddin, Rauf. Tiger, Nadir
Ali, Salimkhan Pathan, Jethabhai Bharwad and Kanu Pillai
under sections 12 B, 376, 342, 354, 153(A), 153(B), 366,
223, 161, 511 IPC and sections 7 and 13(1)(d), 13(2) of
the P.C. Act and Under Sections 3, 4 and 6 of the
Official Secret Act in the Anti Corruption Bureau,
Gujarat State. After investigation, the police filed six
charge-sheets filed against the aforesaid seven accused
persons and also against Javedkhan Pathan, Yusufkhan
Pathan, Usmangani Merchant, Vijay Mehta, Dr.Rameshbhai
Dave and L V Kharadi for offence Under sections 120 B

366, 376, 342, 354, 323, 384, 511, 170, 223, 468, 506 IPC and Sections 7,12 read with 13 (2) of the Prevention of Corruption Act. All the charge-sheets were clubbed together and charges were framed by the impugned order dated 2.1.1997 passed by the Special Judge, Court No.11, Ahmedabad, against all the 12 accused persons including the present petitioners in Criminal Revision Application No.12/97 i.e. L V Kharadi and in Criminal Revision Application No.17/97 i.e. Vijay Natverlal Mehta and in Criminal Revision Application No.18/97, V Kanu Pillai.

3. It appears that on a representation of the accused-Dr.V Kanu Pillai made in October, 1996, the Government took a decision on 11.2.1997 and directed further investigation of CR No.20/95. The State Government further directed that the investigation shall be carried out by the District Superintendent of Police, CID (Crime) under the supervision of Addl. Director General of Police, CID (Crime). This order of the State Government was challenged by Ms. Bijal Revashankar Joshi by filing Special Criminal Application, which was registered as Special Criminal Application No.204/97, under Article 226 of the Constitution of India. This Court, hearing all concerned, by judgment dated 28.2.1997, directed that C.R. No.20/95 be further investigated by the CBI particularly on the point on which the State Government has directed for further investigation. The Court granted two months' time to the CBI to further investigate and to submit report. It appears that Ms.Bijal Joshi, petitioner in Special Criminal Application No.204/97, approached the Supreme Court by way of Special Leave Petition, but the same was rejected. This Court, by order dated 29.4.1997 clarified that the investigation shall be not only confined to the point on which the Government has directed which has been reproduced in para 8 of the order dated 28.2.97, but the direction is for the complete investigation. The CBI has submitted summary of the investigation before this Court which was taken on record on 16.1.1998. It appears from the report that during the investigation, the CBI examined as many as 142 witnesses and collected 125 files/documents. Conclusions of the further investigation as stated in para 38.3 of the report reads as follows:

"On the basis of evidence on record it is, thus,
concluded that;

(a) The allegations of rape against Shri Pillai,
former IGP, Prisons, Gujarat State, is not

established.

- (b) The allegation of rape against Const. Salim Khan Pathan is also not established but their intimacy with each other is established.
- (c) There was no conspiracy to cause escape of notorious criminal Javed Khan from the jail. It is unthinkable to believe that V Kanu Pillai, IG, Prisons, could have participated in such a conspiracy. In fact, investigation discloses that no jail break or escape of any prisoner took place in the entire State of Gujarat during his tenure and that he was coming down heavily on the hardened criminals by way of denying them home food and turning down their requests for shifting them from high security cell to the ordinary cells. The fact of the matter is that he was responsible for invocation of Section 268 of Cr.P.C. against several such criminals. It is also worth mentioning that V Kanu Pillai had given permission only to interview ordinary prisoners and not high security prisoners and, therefore, he cannot be held responsible for Ms. Joshi succeeding in meeting the high security prisoners due to the misconduct of the subordinate jail staff.
- (d) The allegation under the Prevention of Corruption Act against V Kanu Pillai, and others is not established.
- (e) The allegations under the Official Secret Act and Section 153 A and 153 B of IPC is not established against anyone.
- (f) V Kanu Pillai had given permission to Ms. Joshi only for meeting ordinary prisoners. Shri B V Bariya, Jailor, recorded that she was not authorised to meet high security prisoners. He referred the matter to Jail Supdt. Kharari for decision. Jail Supdt. Kharadi unauthorisedly allowed her to meet high security prisoners and violated the orders of his IGP. It is, therefore, proposed to recommend RDA for Major Penalty against him. It is also proposed to recommend RDA for Minor Penalty against Jailor Bariya."

It is contended by Mr P M Thakkar, learned Advocate that in view of the report of the CBI, there is absolutely no

case against accused petitioners, and therefore, in addition to what has been contended on the basis of the existing police report, there is absolutely no case against them. I cannot agree with the submissions made by the learned Advocates for the accused persons as this will be for the trial court to consider on the basis of the materials collected by the CBI by way of further investigation as to whether there is sufficient material against the accused persons to put them to trial. The CBI has only submitted a summary of the investigation in this Court. The report along with the documents are still required to be submitted before the trial court. However, there is substance in the contentions of the petitioners that in view of the report of the CBI, on further investigation, it would be expedient if the entire matter is reheard by the trial court on the question of framing of charges and for that, the impugned order will be required to be set aside. The learned Advocate General in all fairness, has no objection on this course being adopted. Thus, in my view, the order passed below Exh.34 dated 16.12.1996 deserves to be set aside, not only in respect of the present petitioners, but also in respect of all the accused persons in Special Case No.56/95 and 56/96.

4. The next question which arises for consideration as to who should be the incharge of the prosecution in the aforesaid trial. The report under section 173(2) of the Code has been submitted by the Anti Corruption Bureau of the State of Gujarat, and therefore, it appears that the incharge of the prosecution is the Public Prosecutor appointed by the State of Gujarat. Now the case has been further investigated by the CBI under Delhi Special Police Establishment Act, 1946 (hereinafter referred to as the 'Delhi Act'). On reading of the provisions of the Delhi Act, it clearly appears that once there is extension of powers and jurisdiction of members of the Establishment, the members thereof while discharging such functions are deemed to be members of the police force of the area and are vested with the powers, functions and privileges and are subject to the liabilities of the Police Officers belong to that force. The Apex Court, in the case of KHEMRAJ v. STATE OF M.P., reported in AIR 1976 SC 173, while dealing with the provisions of the Delhi Act, has found that when a matter is investigated under the Delhi Act, the officers concerned are under the superintendence of the officers appointed by the Central Government, under the Central Government. The Central Government, therefore, is concerned with the investigation of the cases by the Establishment and its ultimate result. In view of this, in my opinion, Special

Public Prosecutor of the CBI alone should be the incharge of the prosecution. The learned Advocate General, without conceding on the point, has submitted that the State Government is interested in free and independent investigation and so as free and independent prosecution and as such the State Government will have no objection if the CBI is held to be Incharge of the prosecution in CR No.20/95.

5. So far as Criminal Revision Application No.85/97 is concerned, it is contended by Mr P G Desai, learned Public Prosecutor that the learned Judge has committed error in discharging the accused-respondent simply on the ground of want of sanction under section 197 of the Code. He submits that the alleged act of the respondent cannot be said to be an act in discharge of official duty, and therefore, there is no requirement of sanction under section 197 of the Act. Mr R C Jani, learned Advocate on the other hand, submits that there is no evidence worth the name against the accused respondent, and therefore, to put him to trial along with other accused persons would be only unnecessary harassment. He further submits that the accused respondent Dr K P Sutaria has been reinstated as Medical Officer. It would not be appropriate for me to enter into the merit of the case even with respect to Dr K P Sutaria as the learned Trial Judge has to give a fresh look to the entire matter, in view of the report submitted by the CBI. In view of this, the order of the trial court below Exh.34 in Special Case No.56/95 dated 16.12.1997 deserves to be quashed and set aside.

5. In view of the aforesaid, Criminal Revision Applications No.12/97, 17/97 and 18/97 are allowed and ordered as follows:

(i) The order dated 2.1.1997 passed below
exh.4 is quashed and set aside with
respect to the present petitioners as
well as all the accused persons in
Special Case No.56/95 and 56/96 pending
in the Court of Special Judge and
Addl.Sessions Judge, Court No.11,
Ahmedabad or to any other Court to which
it has been transferred.

(ii) On submission of the report of the CBI
along with the documents of the further
investigation in Criminal Case
No.CR.20/95 and Criminal Case
No.CR.2/S/97/SCB-Mumbai as registered by

the CBI, the learned Trial Judge shall re-hear all the accused persons under section 227 of the Criminal Procedure Code for framing of charge.

(iii) The Special Public Prosecutor, CBI shall be the Incharge of the Prosecution, and the case or cases will be conducted by him alone.

Order passed below Exh.34 dated 16.12.1996 by the Addl.City Sessions Judge, Court No.11 in Special Case No.56/95 is quashed and set aside. However, this order will not prejudice the decision of the State Government in the matter of reinstatement of the accused-respondent Dr. K P Sutaria.

6. The trial court will take up this matter on top priority and will expedite at least the stage of hearing of all the parties under section 227 of the Code.

7. The CBI is directed to submit the police report of further investigation along with the documents in accordance with the provisions of section 173(8) of the Code.

Rule made absolute to the aforesaid extent. Direct Service is permitted.

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msp.